No. 11,418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE WAREHOUSE COMPANY (a corporation),
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY (a corporation),
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

PETITION OF APPELLANT, LAWRENCE WAREHOUSE COMPANY, FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant, Lawrence Warehouse Company, hereby petitions the Court for a rehearing in the above entitled cause upon the ground that the Court erred in its decision as to matters of law and fact.

In support of its petition, petitioner respectfully shows:

The trial Court found that the fire resulted from the acts of the defendant, McGrew. This Court in its opinion states:

> "To begin with, we are obliged to accept as true the finding that the fire originated from the use by McGrew of an acetylene torch in the cutting up of a steel tank in the engine room."

The trial Court and this Court have both found that McGrew was given authority to enter the premises by the defendant, Capitol Crevrolet Company, and that that company gave such authority in supposed compliance with the terms of its lease with the defendant, Henry, the owner of the premises.

The record is perfectly clear that this defendant, Lawrence Warehouse Company, had no knowledge of the request for entry or of the fact of entry, and it was not even charged that Lawrence in any way authorized the entry. Had no entry been authorized by Capitol Chevrolet, no fire would have occurred. Therefore, the act of permitting McGrew to enter the premises with the blow torch and of permitting him

to cut up the steel tank in the premises was the actual proximate cause of the damage. The essential "dereliction" of the Capitol Chevrolet, from which the damage resulted, was the act of permitting entry to cut the tank with the blow torch.

In its briefs and upon the oral argument, your petitioner urged that it could not be held liable for this dereliction on the part of the Capitol Chevrolet for the reason that the act performed by Capitol Chevrolet was clearly outside the authority of Capitol Chevrolet as agent and was performed pursuant to the terms of its leasehold agreement with its landlord and did not even purport to be performed in accordance with or under the terms of the agency agreement.

In its briefs Lawrence set forth the authorities delineating the doctrine of *respondeat superior.* From those authorities it is clear that before a principal may be held for the act or omission of its agent, that act or omission must be within the scope of the agent's authority.

When a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible for either the act or omission of the servant.

Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234.

Also, we pointed out that the trial Court had failed to find that the dereliction of Capitol Chevrolet was within the scope of its authority as agent, and that

such a finding is essential to support the trial Court's judgment.

In its opinion this Court states:

> "Now if Capitol was negligent in safeguarding the goods it follows as a matter of course that its dereliction is imputable to its principal, Lawrence. The latter argues that Capitol's negligence, if any, was not shown to be within the scope of its authority as an agent, and that there was no finding that it was. While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency agreement fully support that conclusion."

We respectfully suggest that the above quoted statement is erroneous as a matter of law.

The first quoted sentence states if Capitol was negligent in safeguarding the goods, it follows as a matter of course that its dereliction is imputable to its principal. That statement can be true as a matter of law only if the dereliction of the agent, which constituted the negligence, was such an act or omission as came within the scope of the agent's authority. The Court takes cognizance of this rule in its next statement:

> "The latter (Lawrence) argues that Capitol's negligence, if any, was not shown to be within the scope of its authority as an agent, and that there was no finding that it was."

Rule 52a of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment;"

The Findings of the trial Court are silent upon the major issue of whether or not the dereliction of Capitol Chevrolet, in permitting McGrew to enter the premises and cut up the steel tank with a blow torch, was within the scope of its authority as agent. In this connection this Court in its decision states:

> "While the findings are not specific in this respect, the trial Court's opinion shows that the decision as against Lawrence was grounded on imputed negligence."

Presumably, the Court intended by this statement to indicate that the Opinion of the trial Court might be used to supply the missing and essential Finding. If so, this Court is, in effect, adopting the trial Court's Opinion as a Finding and thus attempting to supply the deficiency.

> "In this case a reading of the trial Judge's opinion reveals a full discussion and treatment of the major factual issues, which leaves no doubt as to which facts the Court accepted and relied upon in rendering its decision. These we can treat as findings of fact and so do."
>
> *Hazeltine Corp. v. General Motors Corp.,* 131 Fed. (2d) 34.

In the case at bar, however, the Opinion of the trial Court is as silent as its Findings upon the essential question of whether the act of the agent in per-

mitting McGrew to enter and cut up the tank with a blow torch was within the scope of its authority as agent. Even if this Court intended to adopt the trial Court's Opinion as additional Findings such an adoption could not supply the fatal deficiency. And the negligence of the agent cannot be "imputed" to the principal in the absence of such a finding.

Furthermore, it is perfectly clear why no such statement is made in the trial Court's Opinion and why no such Finding was made, for all of the evidence shows that the permissive entry and the acts performed by McGrew pursuant to that entry, if performed with the consent of Capitol Chevrolet, were founded not upon its agency for Lawrence but upon its relationship as tenant of the owner, Henry. Had the Court, therefore, made such a Finding, it would have been without support in the evidence and contrary to the evidence. We therefore respectfully suggest that the exception to Rule 52a, stated in the *Hazeltine Corporation* case, cannot be availed of in this case and that in the absence of the essential finding, this Court should reverse the judgment against Lawrence.

We believe that this Court has followed the error of the trial Court. We take it there can be no dispute of the legal principle that the negligence of an agent can only be imputed to the principal when and if the negligent act is within the scope of the agent's authority. Therefore, to state that in the absence of a finding the trial Court's Opinion shows that the decision against Lawrence was grounded only on imputed negligence merely begs the questions.

The legal proposition argued in the briefs and again upon the hearing was that the negligence of the agent could not be imputed to Lawrence because the evidence was clear that the act of the agent for which the principal is charged was an act outside of the scope of the agent's authority.

The Court then concludes its discussion of this phase of the case:

> "The facts of the case and the terms of the agency agreement fully support that conclusion."

The "conclusion" referred to is "that the decision as against Lawrence is grounded on imputed negligence."

The error of the trial Court, and we submit the error of this Court, was in overlooking the rule that negligence of the agent may only be imputed to the principal where the act was within the scope of the agent's duties.

This Court further states in its opinion:

> "The corporation furnished to Lawrence and Capitol a list of named persons whom it authorized to be admitted to the premises. Though some point is sought to be made of this circumstance, we fail to see significance in it. Capitol and its employees were not excluded, and there is no evidence that the actual custodianship of either bailee was in any way interfered with."

This statement we believe also to be erroneous as a matter of law . The list of named persons effectively excluded every employee of Lawrence Warehouse Company from the premises. To say that such an

exclusion did not interfere with the actual custodianship of Lawrence seems to us to state a most unusual and new proposition of law. It is, in effect, to state that a bailor may exclude a bailee from the premises in which goods are stored without interference with actual custodianship. Here a principal was excluded from the premises of its agents by the act of the depositor, yet the principal is held by imputation for the act of the agent when even the normal control of the agent by the principal was made impossible by the depositor.

We respectfully submit that in view of the admitted absence of any negligence on the part of Lawrence and in view of the fact that all of the evidence shows that the act of the agent was an act outside of the scope of its authority, and in the absence of any finding or statement of the trial Court to the contrary, the judgment against Lawrence Warehouse Company should be reversed, and we most respectfully request a rehearing.

Dated, San Francisco, California,
December 31, 1947.

Respectfully submitted,

W. R. Wallace, Jr.,

W. R. Ray,

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Attorneys for Appellant and Petitioner, Lawrence Warehouse Company.

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for rehearing of Lawrence Warehouse Company is well founded and that it is not interposed for delay.

Dated, San Francisco, California,
December 31, 1947.

W. R. WALLACE, JR.,
W. R. RAY,
Attorneys for Appellant and Petitioner,
Lawrence Warehouse Company.

WILLIAMSON & WALLACE,
Of Counsel.